

OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 94-14

November 2, 1994

TO : All Regional Directors, Officers-in-Charge
and Resident Officers

FROM : Fred Feinstein, General Counsel

SUBJECT: Section 102.118 Delegation

Section 102.118 of the Board's Rules and Regulations, as amended, requires that any party seeking to procure the contents of files under the General Counsel's control in Washington or in the Regional Offices, or the testimony of any Board agent or attorney there employed, must secure the authorization of the General Counsel. As a "housekeeping" regulation, Section 102.118 does not itself establish a privilege on which the Agency can rely to avoid or prevent the disclosure of file documents or agent testimony. Rather, it merely provides an orderly procedure for Agency heads to consider requests or demands for evidence within their control and either to provide the evidence or to assert a recognized privilege for withholding it.¹

Over the years, Section 102.118 requests have been submitted to the General Counsel by members of the public, members of the Bar, officials of other governmental entities and Regional Directors seeking Board documents and Board agent testimony in NLRB and other administrative and court proceedings. Requests from private individuals and law enforcement personnel have also sought compliance with subpoenas issued by Federal and state courts.

Because they were routinely granted when made, two classes of requests have been addressed in blanket General Counsel authorizations. Former General Counsel Peter G. Nash, by memorandum dated February 2, 1972, authorized all compliance officers and other Board agents serving in a compliance officer role to testify in backpay proceedings with regard to the compliance specification preparation. In Memorandum GC 92-2, dated March 20, 1992, former General Counsel Jerry Hunter authorized all Regional Directors to prepare Vaughn indexes in response to appropriate requests under the Freedom of Information Act.

¹ N.L.R.B. v. Capitol Fish Co., 294 F.2d 868 (5th Cir. 1961); Singer Sewing Mach. Co. v. NLRB, 329 F.2d 200 (4th Cir. 1964); see also, Exxon Shipping Co. v. U.S. Department of Interior, ___ F.3d ___, (9th Cir. August 29, 1994).

Because other classes of requests under Section 102.118 frequently have been granted and in order to speed consideration of requests and eliminate paperwork and layers of review, I have decided to delegate to Regional Directors the authority to consider and decide whether or not to approve requests for authorization under Section 102.118 in the following additional circumstances, in the name of the General Counsel:²

1. when a party to a representation case alleges that Board agent conduct has interfered with the conduct of an election and Board agent testimony regarding the issues is necessary to develop a complete record,
2. when Board agent testimony is necessary to authenticate the signature of a deceased or unavailable witness for whom the agent prepared an affidavit, or to establish that the General Counsel made a good faith effort to locate the unavailable witness,
3. when Board agent testimony is necessary to establish that a respondent has failed to perform an affirmative act pursuant to a court enforced Board Order, or
4. when a request for access to Regional Office files unaccompanied by a subpoena is made by an official of a federal, state or local government agency in connection with law enforcement activities.³

² Letters to Section 102.118 requesters should contain a complimentary close from the General Counsel, by the Regional Director.

³ Our current policy with respect to granting an official of a federal agency access to our files and the authority to photocopy documents contained therein is set forth in Memorandum 74-17, "Requests of U.S. Government Agencies to Inspect and/or Copy Material in NLRB Investigative Files," dated March 21, 1974 (copy attached). Officials of state and local government agencies should be accorded similar cooperation. Regional Directors should remind the government officials to whom we accord such cooperation that our non-public file information was gathered for law enforcement purposes. The officials should be requested to assert any available privileges and resist disclosure if a request for disclosure of the information is made. In this regard a federal agency would have the FOIA exemptions available to resist inappropriate disclosure. Many states also have statutes similar to FOIA providing access to their files while exempting disclosure of certain documents. In addition, the official should be informed that it is expected that before disclosing the information supplied from our files to any source, the Regional Director will be informed.

In circumstances other than those set forth above, Section 102.118 requests from outside parties or counsel for nonpublic file documents or Board agent testimony, unaccompanied by a subpoena, normally should be denied by the Regional Director in the name of the General Counsel.⁴

⁴ It is the policy of the Office of the General Counsel to preserve the confidentiality of statements and materials contained in our investigatory files obtained in the course of an administrative investigation of unfair labor practice charges and representation cases and to produce such materials in Board proceedings only to the extent required by Section 102.118(b)(1), which provides that statements of witnesses called by the General Counsel are to be made available after the witness has testified. In this regard, it has consistently been held that the Act does not compel the Board to provide for discovery in its proceedings, and further, that the unavailability of discovery is not a prejudicial denial of due process. See, e.g., N.L.R.B. v. Robbins Tire and Rubber Company, 437 U.S. 214 (1978); McClain Industries, Inc. v. N.L.R.B., 521 F.2d 596 (6th Cir. 1974); Wellman Industries, Inc. v. N.L.R.B., 490 F.2d 427 (4th Cir. 1974); N.L.R.B. v. Automotive Textile Products Company, Inc., 422 F.2d 1255 (6th Cir. 1970); North American Rockwell Corporation v. N.L.R.B., 389 F.2d 866 (10th Cir. 1968); N.L.R.B. v. Movie Star, Inc., 361 F.2d 346 (5th Cir. 1966); Raser Tanning v. N.L.R.B., 276 F.2d 80 (6th Cir. 1960), cert. denied 363 U.S. 830.

Also, the Office of the General Counsel has no obligation to disclose exculpatory evidence contained in the investigatory file, if any there be. Erie County Plastic Corporation, 207 NLRB 564, 570, enf'd 505 F.2d 730 (3rd Cir. 1974). In addition, internal recommendatory or predecisional memoranda are protected from disclosure based on the historic privilege against disclosure of intra-agency memoranda and communications. N.L.R.B. v. Sears, Roebuck & Co., 421 U.S. 132, 149-152 (1975); Davis v. Braswell Motor Freight Lines, Inc., 363 F.2d 600, 603 (5th Cir. 1966). Lastly, such materials are privileged from disclosure as attorney work product. Hickman v. Taylor, 329 U.S. 495 (1947).

Moreover, it is the policy of the Office of the General Counsel, absent a showing of most unusual circumstances, not to permit Board agents to testify or to provide information concerning or investigative documents relating to the processing of unfair labor practice or representation cases. The reason for this policy is that the highly sensitive and delicate role of a Board agent in processing such cases would be seriously impaired if a real likelihood existed that he or she would become a material witness in the litigation of such cases or if investigative information, which is otherwise confidential and not subject to disclosure,

Where special circumstances are present, or the Regional Director believes authorization is warranted, the request should be submitted to the Division of Operations-Management together with the Regional Director's comments, and the General Counsel will respond.⁵

As under current practice, Regional Directors should insist that Section 102.118 requests from an outside party be in a writing that sets forth with particularity the testimony or document sought, the nature of the proceeding for which the testimony or document is sought, and the purpose for which it is sought. When requests for authorization in the foregoing circumstances are received in the Regional Office, the Director should respond in writing on behalf of the General Counsel. When such requests are received by the General Counsel in Washington, they will be referred to the appropriate Regional Director for response.

When a Regional Director, sua sponte, believes Board agent testimony is required in the circumstances described in categories 1 through 4 above, his or her authorization must be memorialized for the file. Copies of 102.118 responses written by Regional Directors to outside parties or counsel on behalf of the General Counsel and file memoranda memorializing Regional Director decisions to authorize Board agent testimony should be submitted to the Division of Operations-Management.

Requests for authorization under Section 102.118 in situations other than those described above will continue to be addressed by the General Counsel.

Subpoenas:

Whenever a Board agent or office receives a subpoena other than a Board subpoena demanding production of file documents and/or Board agent testimony concerning any Agency business, the Region should follow the procedures of

would become public. The Board has recognized the merits of this policy in Frank Invaldi, et al., A California Limited Partnership d/b/a Sunol Valley Golf and Recreation Co., 305 NLRB No. 52 (1991) and G. W. Galloway Company, 281 NLRB 262, fn. 1 (1985). The limited evidentiary privilege for the informal deliberations of all prosecutorial agencies and branches of government also has been recognized in the courts as applying to internal Board documents and agent testimony. J.H. Rutter Rex Manufacturing Co. v. N.L.R.B., 473 F.2d 223 (5th Cir. 1973); Stephens Produce Co., Inc. v. N.L.R.B., 515 F.2d 1373 (8th Cir. 1975).

Requests for the testimony of a Regional Director normally will be considered and addressed by the Regional Director under this delegation.

Casehandling Manual Section 11822 and should immediately contact the Special Litigation Branch at (202) 273-2930.

Any questions concerning this matter should be addressed to your Assistant General Counsel.


F. F.

Attachment

cc: NLRBU

OFFICE OF THE GENERAL COUNSEL

MEMORANDUM 74-17

March 21, 1974

TO: All Regional Directors, Officers-in-Charge,
and Resident Officers

FROM: Peter G. Nash, General Counsel

SUBJECT: Requests of U. S. Government Agencies to
Inspect and/or Copy Material in NLRB
Investigative Files

In response to requests for guidelines with respect to procedures to be followed by Regional Offices in circumstances where a Federal agency makes a request to inspect and/or copy materials in NLRB investigative files, this memorandum sets forth the appropriate procedures to be followed when such a request is made by a Federal agency. As you know, this matter was the subject of workshop discussion at our San Antonio Conference and a proposed draft of these guidelines was distributed to you for your consideration at that time.

My policy is to provide full cooperation and assistance to U. S. Government agencies where an appropriate request has been made. Accordingly, if an employee of a Federal agency requests permission to inspect an NLRB investigative file, such permission should be granted provided: (1) a written request has been made to the Regional Director by the head of the requesting employee's immediate organizational unit; and (2) the inspection is done at the Regional Office. With respect to the first requirement, the request must identify the employee who will inspect the file. In addition, the request should ordinarily identify the specific case file or files to be inspected. However, there may be circumstances where the request is, of necessity, a general one, e.g., all cases involving a particular labor organization or employer. Such a general request should nonetheless be honored provided, of course, that the employee of the requesting agency performs the work of going through the card catalog and identifying the files which he wishes to inspect. In addition, there may be emergency circumstances in which there is insufficient time for the requesting agency's organizational head to make a written request. In such cases, a telephonic request by a proper official of the requesting organization to the Regional Director will suffice. The Regions should maintain records concerning all such requests, whether oral or written, indicating the case name and number, the date of inspection, and the name of the inspecting person and his or her organization.

If an employee of a Federal agency desires a copy of material in the investigative file, a written request must be made by the head of the employee's immediate organizational unit to the NLRB General Counsel.

A copy of such request should be sent to the Regional Director of the Regional Office involved. Any such requests must describe with particularity the material to be copied, the relevance of such material to the requesting agency, and the precise manner in which the agency intends to use such materials. After consideration of the request, the General Counsel will inform the requesting agency as to whether permission to copy has been granted and, if so, whether there are any limitations as to the uses to which such copies may be put. Simultaneously, the General Counsel will advise the Regional Director of his decision and instruct him accordingly. As with requests to inspect, there may be emergency situations in which there is insufficient time for the requesting agency's organizational head to make a written request for a copy of material. There also may be occasions when a Federal Judge or grand jury requesting the material will refuse to comply with the requirements of seeking permission from the General Counsel. All such situations should be brought to the immediate attention of your Assistant General Counsel, including the necessary relevant information concerning the request. You will be advised promptly as to how to proceed in each such situation.

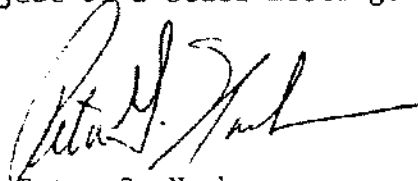
If the Federal agency is merely requesting a copy of a document in the public, or formal, file, it is not necessary that written request be made to the General Counsel. In such circumstances, the Regional Director can provide the documents and certify their authenticity if requested to do so. Of course, the request for the documents should be in writing.

In circumstances where materials are to be copied, such copying must be done at the Regional Office by an employee of the NLRB. Similarly, as with requests to inspect files, records should be maintained whenever a copy of material in the case file is furnished to another Federal agency. In addition to the information which should be recorded whenever files are inspected, the record should identify the specific material which has been copied. When a request is made for the original of the material and permission is granted by the General Counsel, the Region should make a copy of the document in question before it is delivered to the other agency. In addition, the return of the original should be required as soon as it has served the purpose of the requesting organization.

The foregoing instructions should cover most situations. There may be, however, unusual circumstances where the Regional Director believes that inspection of the file or compliance with a request for a copy of file materials would be an impediment to a current investigation or have an adverse effect on case handling. In such circumstances, where inspection is requested, the Regional Director should set forth his reasons for not recommending that inspection be permitted in a memorandum to Associate General Counsel DeSio and should not permit inspection unless authorized to do so by Mr. DeSio. If copying is requested, the Regional Director should also set forth his views concerning that aspect of the request.

In view of the above-stated policy to provide in appropriate circumstances other Federal agencies with materials, including affidavits from our investigative files, Board agents when interviewing witnesses should advise such witnesses of the possibility that their statements may be shown to another Federal agency upon a valid request for information. It should further be stressed to the witnesses, however, that such requests from other agencies are infrequent. The witnesses also should be told that their affidavits will remain confidential unless the witnesses are called to testify at a hearing and an appropriate request for such affidavit for the purposes of cross-examination is made upon the conclusion of direct testimony.

This memorandum should be made the subject of a staff meeting.



Peter G. Nash

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